

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

[Grievant]  
Grievant

Record of Proceeding  
FSGB No. 2006-011

And

April 12, 2007

Department of State

**ORDER: MOTION FOR  
RECONSIDERATION - EXCISION**

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For the Foreign Service Grievance Board:

Presiding Member:

Garvin Lee Oliver

Board Members:

Robert J. Bigart  
Thomas Jefferson Jr.

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Neera Parikh, Esq.  
American Foreign Service Association

Representative for the Department:

Joanne M. Lishman  
Director  
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

## **ORDER: MOTION FOR RECONSIDERATION**

### **I. BACKGROUND**

[Grievant] (grievant) appealed the January 3, 2006 decision of the Department of State (Department, agency) denying a grievance that he filed on October 3, 2005. He claimed that advanced supervisory training, a letter of commendation, and award nominations that he had received were not documented by the Department in his Official Performance Folder (OPF). He also claimed that the Department violated the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994<sup>1</sup> (USERRA) by not extending his Time-in-Class/Service dates, by not including military evaluations and awards earned while on active and inactive duty, and by not specifically instructing promotion boards to “weigh carefully and consider, to the extent the uniformed service can be deemed relevant, an employee’s military service.”

Grievant’s appeal was received by the Board on May 2, 2006. At that time, he was on Leave Without Pay (LWOP) from the Department and serving on active duty in the U.S. Army. On July 14, the Board issued a DECISION: TIMELINESS, which dismissed his appeal on the grounds that it was not timely.<sup>2</sup> [Grievant] later requested that the Board reconsider its decision. On August 22, the Board issued an ORDER: MOTION TO RECONSIDER, which granted his request and accepted his appeal as timely.

On September 27, [Grievant] sent copies of several e-mail messages to the Board “for the FSGB record.” The Department objected to the inclusion of these messages in

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<sup>1</sup> 38 U.S.C. Sections 4301 *et seq.*

<sup>2</sup> 22 CFR Section 903.1(b) provides that a member of the Foreign Service is entitled to appeal to the Board no later than 60 days after receiving the agency decision. The Board may waive the time limit for good cause. In our decision, we found that [Grievant] had not shown good cause to extend the filing period.

the record, contending that they were immaterial and irrelevant, had never been the subject of any grievance presented to the agency, and related to matters pending before other Department offices. On October 18, 2006, the Board issued an ORDER: MOTION TO STRIKE, which excluded the messages from the Record of Proceedings (ROP).

On October 19, 2006, the Department asked the Board to modify its October 18 ORDER: MOTION TO STRIKE, and to also strike from the record an October 11 e-mail message from grievant. The Board granted the Department's request in its December 7 ORDER: MOTION FOR MODIFICATION OF BOARD'S ORDER.

In e-mail messages of October 18 and November 21, 2006, [Grievant] requested a hearing before the Board. The Department opposed his request for a hearing on the grounds that it was untimely and unnecessary. In its December 13 ORDER: HEARING REQUEST, the Board denied grievant's request for a hearing. Grievant was given 20 days to file a supplemental statement. On January 11, 2007, grievant's AFSA representative advised the Board that grievant would not submit a supplemental statement. The ROP was closed on February 9, 2007. The Board issued its decision on March 7, 2007. The appeal was denied. On March 12, 2007 grievant sent a "Motion to Reconsider" to the Board and on March 14 he sent a supplemental submission to his motion. In a memorandum dated March 20, 2007 the Department provided its comments and requested that the Board deny grievant's Motion.

## **II. ISSUE**

This order addresses grievant's Motion to Reconsider our March 7 decision.

### III. POSITIONS OF THE PARTIES

#### THE GRIEVANT

[Grievant] complains that the FSGB decision is irrational, arbitrary, capricious, and in violation of USERRA. He alleges that the Department engaged in prohibition of speech and that the Board sustained the actions to block a hearing before the Board, and to block the introduction of documents and evidence to the Board. This was “a violation of my fundamental First Amendment right to free speech.”

Grievant claims that the Board’s decision is contrary to law. The Board erred by taking administrative notice of the Department's claim that a Superior Honor Award (SHA) nomination could not be included in his OPF. “The Department's position is not codified in the FAR, FAM or FAH thus is irrelevant.”<sup>3</sup> There is no copy of a regulation about this in the file. The document must be located and made part of the record.

Grievant claims that he met his burden of proof “and the FSGB sustained the proof in its finding of facts, however the FSGB decision failed to acknowledge properly that the Department . . . made gross errors.” The FSGB decision, claims grievant:

[D]efies logic and is absent of a rational connection between the facts that I presented, what the Department agreed with me on, that which the FSGB sustained, evidence found and the choice made. . . . The FSGB decision and subsequent action is not based upon any consideration of relevant factors and so is grossly arbitrary, [sic] capricious that it abuses discretion. The FSGB decision is not in accordance with law and it was taken without observance of procedural law and rules of evidence as required. . . . The FSGB did not . . . allow me to call witnesses to counter the Department's arguments.

He contends that the FSGB decision that he was not harmed by the omission of documents from his file is “simply illogical.” The Department violated USERRA by not

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<sup>3</sup> The acronyms within the quotation are not defined by grievant. The Board assumes them to stand for Federal Acquisition Regulations, Foreign Affairs Manual, and Foreign Affairs Handbook, respectively.

extending his TIC/TIS dates and by not including military evaluations and awards in his OPF.

He contends that the FSGB and the Department did not ensure with empirical fact or data that the Selection Board fully complied with instructions that promotion boards consider military service. He claims that the Board made an arbitrary and capricious decision, “without using any experimental method where data could have derived from the systematic manipulation of variables in the Department's published selection or promotion statistics.”

He contends that the Board’s decision is not in accordance with procedural law as required in determining burden of proof. Training that he took was necessary and important. The Board should not have accepted the Department's explanation that information about this training should not have been included in his OPF.

With respect to a letter of commendation which was missing from his OPF, he claims that the Department's explanation, that it had conducted a review of its e-mail records and found no record of the letter, was not responsive as the letter never had been e-mailed.

#### **THE AGENCY**

The Department opposes grievant's motion because it fails to demonstrate any of the criteria required for a grant of a motion for reconsideration. Grievant had not presented any newly discovered or previously unavailable material evidence; he has not cited an intervening change in controlling law; nor has he persuasively argued clear legal error or manifest injustice.

Grievant failed to support his broad assertions, particularly with respect to his claims that his constitutional rights and USERRA rights have been violated. He cited no regulation that requires the Department to obtain the disputed documents from him or to include them in his OPF. The Board's decision made it clear that not all documents are appropriate for inclusion in an OPF and that an employee bears a responsibility to obtain and submit certain types of documents to the Department for inclusion in the OPF.

Grievant offers no basis for his claim that the Board was wrong by taking administrative notice of the Department's claim that an SHA nomination could not be included in his OPF. The Board correctly relied on the regulations to find that approved award nominations are to be included in the OPF.

#### **IV. DISCUSSION AND FINDINGS**

Under §1106(9) of the Foreign Service Act (22 U.S.C. §4136(9)) and our regulations (22 CFR §910.1), the Board may reconsider any decision upon presentation of newly discovered or previously unavailable material evidence. In practice, as we have stated in decisions on previous requests for reconsideration, we have been guided by an expanded version of the statutory and regulatory standards derived from pronouncements of the courts:

A motion to reconsider shall be based on (1) an intervening change in controlling law, (2) availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice. . . . Absent extraordinary circumstances, revisiting the issues already addressed is not the purpose of a motion to reconsider. *In re: American Freight Systems, Inc., Debtor*, 213 B.R. 914 (D. Kan. 1997).

*See* FSGB Case No. 1998-021 (Order: Attorney Fees, September 1, 2004, at p. 5).

In the circumstances presented here, the Board finds that the grievant's motion is not based on "an intervening change in controlling law." He has cited none. He has not

provided any new evidence. Nor has he shown that there is a need for the Board to reconsider its decision to “correct clear error or to prevent manifest injustice.”

In order to ensure grievant the fullest measure of due process, we have carefully reviewed our decision in light of grievant’s claims as presented in his motion. First, we note that grievant, in his March 12 and 14 submissions, makes abundant use of various nouns and adjectives to describe the Board and its actions in this case. He claims that the Board’s decision was “unreasonable, arbitrary, capricious, invalid,” it “defied logic,” was “irrational,” yet we find that he has provided no evidence to support his claims.

Insofar as grievant’s motion appears to concern specific aspects of the Board’s decision, we discuss them below:

#### The SHA Nomination

In our decision, we found no merit to grievant’s claim that the agency erred because it failed to include a copy of the SHA nomination in his OPF. We cited agency procedures at 3 FAH-1 H-4816.2, which provide that “*approved* award nominations” are to be included in the OPF. The record in the case was and is clear about the fact that grievant was not awarded an SHA, or put in other words, the nomination for the SHA was not approved but rather was downgraded to, and approved as, a Meritorious Honor Award (MHA). Thus, while there was a requirement that the agency include a copy of the approved MHA, there was no requirement for the agency to include copies of an award nomination, the SHA, that was not approved. Grievant’s arguments in his motion are without merit.

Inclusion of military awards and evaluations/Instructions to Selection Boards to consider an employee's military service

In his motion, [Grievant] reiterates a claim that he made in his appeal to the Board: that the Department failed to include copies of his military awards and evaluations in his OPF. In our decision, we noted the agency policy which describes action employees can take to submit copies of these documents for inclusion in the OPF. We found that grievant had presented no evidence or other proof showing that he submitted copies to the agency. In his motion he has provided no evidence or argument that warrants reconsideration of this issue. As well, we find that his assertion that the Board failed to ensure “with empirical fact or data” that the SB considered his military service is without merit. The promotion precepts advised the SB to consider relevant documentation of military service, including awards, evaluations and any statements submitted by the member. As noted above, we found no evidence that grievant had submitted any such material to the agency. We do not discern any additional empirical facts or data that are relevant to the issue.

Training

Grievant's claim in his motion mirrors the claim made in his appeal: that information about training he completed in 1997 and 1998 should have been included in his OPF. In our decision, we found that his claim lacked merit as he failed to show that he was harmed. Under agency procedures, information about this particular training was not included in the OPF for any employees. Grievant fails in his motion to convince us that the agency erred in not including the information in his file, or that the Board erred in its holding on this matter.



### Letter of Commendation

The Board finds no merit in grievant's claim. He says that the Department's explanation about the letter is that it conducted a review of its e-mail records and found no record of the letter. He claims that this explanation was not responsive as the letter has never been e-mailed nor was it an e-mail. His argument makes no sense. We have reviewed the record and find no record of the Department claiming that it had reviewed e-mail records with respect to this issue. We sustain our finding in the decision, in which we found that the Department's explanation to grievant -- "The Department notes that a review of its accountable mail records . . . was conducted and no record . . . pertaining to the letter of commendation was found" -- was responsive.

### Extension of TIC/TIS dates

Grievant claims that the Department has failed, from 1987 to the present, to comply with USERRA in extending his TIC/TIS dates. In our decision, we noted the Department's policy concerning USERRA compliance, i.e., "*When the employee concludes active duty service and comes off LWOP* (italics added for emphasis), the TIC/TIS date" is extended by the exact amount of time served on active duty. We found that the Department was responsive about the issue in the sense that it acknowledged its intention to complete the required action at some time in the future. Grievant has failed to provide new evidence or convincing argument showing that the Department is not proceeding in due course to complete action required to extend grievant's TIC/TIS dates. Nor has he shown or even alleged that he has been harmed by the Department's action.

As with his grievance, [Grievant] has the burden of proving that his motion has merit. We find that he failed to meet his burden. Accordingly, the motion is denied.

## **V. ORDER**

The motion for reconsideration is denied.